United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 07-1246**
	)	**Issued: December 13, 2007**
DEPARTMENT OF THE NAVY, NAVAL POSTGRADUATE SCHOOL, Monterey, CA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 16, 2007 affirming a termination of compensation effective July 8, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate compensation for wage-loss and medical benefits effective July 8, 2006.

FACTUAL HISTORY

Appellant filed a traumatic injury claim alleging that she sustained a lower back injury in the performance of duty on October 17, 2001 when she was lifting children in the toddler classroom. The Office accepted the claim for a lumbosacral strain.[1] Appellant returned to work

[1] A statement of accepted facts dated January 12, 2006 reported that the accepted injury was a lumbosacral sprain.

in June 2002 in a light-duty position at four hours per day. On December 9, 2005 she stopped working as light duty was no longer available. Appellant began receiving compensation for temporary total disability.

The Office referred appellant, a statement of accepted facts and medical records to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon. In a report dated April 27, 2006, Dr. Swartz provided a history and results on examination. In response to inquiry as to the diagnosis, he stated that appellant had a disc protrusion or herniation at L5-S1 without nerve root or spinal cord compression. Dr. Swartz then discussed an "inconsistency" with respect to the initial claim. He indicated that appellant was seen on October 21, 2001 by a Dr. Wells and the history reported only that she woke up on October 18, 2001 with major back pain. According to Dr. Swartz, "This would raise a question regarding this claim or the mechanism of injury." He also stated that appellant was diagnosed with myofascial pain syndrome and had reported a history of fibromyalgia, which raised additional questions regarding the claim. In response to a question as to whether the diagnosed condition was causally related to the work injury, Dr. Swartz responded, "There is no evidence at this time of a work-related injury and I would again refer to the doctor's first reported work injury by Dr. Wells … dated October 21, 2001." He described objective findings of pain with straight leg raising, but reported evidence of symptom magnification. Asked to describe any nonindustrial or preexisting disability, Dr. Swartz reported the L5-S1 disc protrusion. He concluded, in response to inquiry as to whether appellant continued to suffer residuals of an injury, "There is no evidence at this time that an injury occurred on October 17, 2001."

By letter dated May 11, 2006, the Office notified appellant that it proposed to terminate her compensation. In an accompanying memorandum, the Office indicated that Dr. Swartz represented the weight of the evidence. The Office noted that Dr. Swartz discussed inconsistencies in the claim, but the point was "somewhat moot, here, however, because the basis of the decision rests on the medical findings relative to the claimant's current medical state, not on her medical condition at the time of her claimed injury."

In a decision dated June 14, 2006, the Office terminated compensation for wage-loss and medical benefits effective July 8, 2006. Appellant requested a review of the written record by an Office hearing representative. By decision dated February 16, 2007, the hearing representative affirmed the June 14, 2006 decision. The hearing representative found that Dr. Swartz provided a well-reasoned opinion that represented the weight of the evidence.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[3] The right to medical benefits is not limited to the period of entitlement to disability. To terminate

[2] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[3] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[4]

ANALYSIS

The Office terminated compensation for wage-loss and medical benefits effective July 8, 2006 based on the report of second opinion examiner Dr. Swartz. The Board notes that the accepted condition in this case was a lumbosacral strain. It is the Office's burden of proof to terminate compensation with respect to the accepted condition. In addition, since the Office referred appellant to Dr. Swartz regarding whether she had any continuing employment-related condition, the Office has responsibility to secure a report that adequately addresses the relevant issues.[5]

The Board finds the April 27, 2006 report of Dr. Swartz to be of diminished probative value. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When the Office has accepted an employment injury occurring in the performance of duty, the physician must base his opinion on the accepted facts.[6] The Office accepted that appellant sustained a lumbosacral strain on October 17, 2001 as a result of lifting a child. In referring appellant to Dr. Swartz, the Office sought a medical opinion as to whether appellant continued to have an employment-related condition or disability.

Dr. Swartz did not specifically discuss the lumbosacral strain, other than to note that it was the accepted injury. He diagnosed an L5-S1 disc herniation or protrusion.[7] Dr. Swartz then discussed at length what he felt were inconsistencies in the claim, in particular an October 21, 2001 report in which the physician did not report an incident involving the lifting of a child. In response to a question as to whether the diagnosed condition was causally related to the work injury, Dr. Swartz stated that there was no evidence at this time of a work-related injury, but the only support he offered for that opinion was to refer to the October 21, 2001 report. While the Office noted that Dr. Swartz's reference to inconsistencies in the claim was "somewhat moot," the only rationale Dr. Swartz provided for his opinion was reference to a 2001 report that did not provide a history of the accepted lifting incident. In addition, Dr. Swartz concluded his report by stating that there was no evidence that an injury occurred on October 17, 2001.

Dr. Swartz premised his opinion that there was no current evidence of a work-related injury on his observation that appellant did not sustain an employment injury as alleged on October 17, 2001. His report is therefore not based on a complete and accurate factual background and is of diminished probative value. The April 27, 2006 report is not sufficient to establish that appellant had no continuing employment-related residuals or disability. The Office

[4] *Frederick Justiniano*, 45 ECAB 491 (1994).

[5] *See Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

[6] *See Paul King*, 54 ECAB 356 (2003).

[7] A magnetic resonance imaging (MRI) scan dated February 22, 2002 reported L5-S1 degenerative disc disease. A second opinion examiner, Dr. Ken Ishizue, diagnosed a herniated L5-S1 disc on July 16, 2004.

did not meet its burden of proof to terminate compensation based on the accepted lumbosacral strain, and Dr. Swartz failed to provide a rationalized medical opinion with respect to any other employment-related condition.

CONCLUSION

The April 27, 2006 report of the second opinion examiner is of diminished probative value and did not resolve the issues in the case.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 16, 2007 and June 14, 2006 are reversed.

Issued: December 13, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board